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Statutory and Traditional Approach to, and Dissolution of, Marriage in Hindu Law: A Comparative Study between Bangladesh and India

Md. Sahidul Islam*

1. Introduction

Hindu law, it is now generally agreed, has the most ancient pedigree of any known systems of jurisprudence. The study of any developed legal system requires a critical and analytical examination of its basic elements as well as the practical and concrete details, which go to make the contents or body of that law. It also requires consideration of the line of development it has pursued. The obstruction and exposition of the principles or distinctions necessarily involved in Hindu law and the consideration of line of improvement, which it has pursued, are appropriate matters of jurisprudence and legal research. Marriage is one of the most ancient institutions tracing back to antiquity and found in every culture. Marriage has been defined "as a socially, religiously or legally recognized union most frequently of a man and a woman for the purposes of forming a family unit; legitimizing sexual relations and procreation; educating and developing offspring; social or economic stability, security, companionship; or various combinations of these purposes."¹ However, religious and statutory approach to marriage is not the same in all the religions and countries. So is the case with the process of termination for the same. This paper aims at to picture out the religious and statutory approach to, and dissolution of marriage in, the Hindu community both in Bangladesh and India with a comparative study for the same between the two countries.

2. Different Forms of Marriage

Traditional Approach: According to the Hindu traditional law marriage is the last of the ten sacraments.² It is a union of both a man and a woman, a sacred tie that can never be broken.³ In the opinion of Romswami Ayer, J, a marriage in the traditional Hindu Law is a *samskaram* or sacrament, the only one mode prescribed for a woman and a man and one of the principal religious relics prescribed for the purification of soul.⁴ In the traditional approach to marriage consent of the parties to marriage is not mandatory. In the language of *Mayne*, under Hindu law, an idiot, lunatic or an impotent person can lawfully give consent

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¹ www.google.com

² *Sundaribai v. Shivnarayan*, ILR (1908) 32. Bom 81/Gandhi, p. 207

³ Gandhi. BM, *Hindu Law* (Delhi: Eastern Book Co., 2003) 2nd Edn. p. 207

⁴ Sir Hari Singh Gaur, *Hindu Code* (Allahabad-211001: Law Publishers (India) Pvt. Ltd) 6th Edn. V II, p. 959

to marriage.⁵ In traditional Hindu law eight forms of marriage viz. Brahma, Daiva, Arsha, Projapatya, Asura, Gandharva, Rakshasha and Paichasha were in vogue. However only first four forms were approved and the remaining four were not acceptable to the Hindu society. Among these eight forms of marriage only *Brahma* and *Ashura* marriage are still in vogue in the Hindu community in Bangladesh.⁶ The disapproved last two forms of Hindu marriages are marriages by violation of the rights of a woman. Therefore, a disapproved but valid form of marriage in Hindu Law, will amount to crime under the Repression of Women & Children Act, 2000 applicable in Bangladesh. An anomaly in law remains which can only be corrected through legislation.

Statutory Approach

Statutory approach to marriage is considerably different from traditional one both in Bangladesh and India. There has been a radical change in the requirement particularly in the caste consideration. In Bangladesh a Hindu marriage is still solemnized by the religious tenets of the traditional Hindu law though the Special Marriage Act 1872 subsequently amended in 1926 approves a Hindu marriage without observing such religious rituals.⁷ Besides, marriage between persons who profess Hindu, Jaina, Buddhist or Sikh religions has also been considered a valid marriage.⁸ In India from 1830 to 1947 (pre-Independence period) and 1947 to 1955 (post Independence period) there has been numerous changes in the matrimonial affairs in some areas with the passing of the Hindu Marriage Act 1955.⁹ In India requirements of marriage have been relaxed considerably by making it contractual in nature.¹⁰ It implies that capacity of parties and mutual consent are now the only requirement to give validity to a marriage in India. No similar legislative developments have taken place in Bangladesh.

3. Essential Conditions of a Valid Marriage under the Ancient Textual Hindu Law

In pursuance to the ancient textual Hindu law there exists some essentials of a Hindu marriage¹¹ namely-

⁵ Mayne, *Text Book on Hindu Law*, 11th Edn. p.143/ ibid

⁶ Prof. Badr Uddin, *Hindu Ain (Hindu Law)* (Uttaran Offset Printing Press, Rajshahi: Quraesha Begum, 1991) p. 209

⁷ Prof. Badr Uddin, p. 209, 210

⁸ *The Special Marriage Act*, 1872, S.2

⁹ Noshirvan H. Jhaval, *Principles of Hindu Law* (Mumbai-400002: C Jamandas & Com) 20th Edn. p. 210

¹⁰ *The Hindu Marriage Act*, 1955, India, ss 5(ii), (iii), 11-13 & 7/ Gandhi. BM, *Hindu Law* (Delhi: Eastern Book Co., 2003) 2nd Edn. p. 211

¹¹ Noshirvan H. Jhaval, p.151

- (i) As per the ancient text, marriage could be possible only between a man and a woman of same caste otherwise it was regarded as invalid unless approved by custom. However this was to some extent relaxed in a case where a marriage would take place between a male of higher caste and a female of lower caste.
- (ii) As per this second rule, a marriage could not take place between a man and a woman of same gotra or provara and the parties to a marriage should not be sapindas of each other. However, this restriction was relaxed in case of a marriage between the Sudras as they had no gotra.
- (iii) Under this rule marriage had to be solemnized through some proper ceremonies, like viva homa or invocation before the sacred fire and saptapadi that means the bride and the bridegroom taking seven steps around the sacred fire, the marriage being completed only when the seventh step is taken.

4. Status of Marriage: Traditional Hindu marriage is sacramental in nature and not contractual like that of the Muslims or any other faith. It is totally a religious matter far from the ordinary outlook of the day. According to Vedas a marriage is "the union of flesh with the flesh and bone with the bone and is indissoluble."¹² However this view is not conclusive. As observed by Manu, in a Hindu marriage there is actually a gift of the bride and an essential part of the marriage ceremony is kanyadan, which fulfills all the requirement of a gift under Hindu law.¹³ In that sense, a Hindu marriage is also both a sacrament and a civil contract. However, the Child Marriage Restraint Act, 1929 regards marriage between two citizens of Bangladesh as "contract".¹⁴ On the other hand as per the Hindu Marriage Act, 1955, which is in force in India, marriage is a civil contract and samskara as because saptapadi, that is taking seven steps before the fire, is retained by the Act as an essential legal ingredient.¹⁵

5. Parties to Marriage: Traditional Hindu law does not specifically prescribe any specific age of marriage for the followers of it. Even a marriage between two minors could also be valid if it is effected with the consent of their respective guardians.¹⁶ Besides every Hindu of sound mind and body is capable of consenting to a marriage irrespective of the age he/she has attained. In Bangladesh according to the Child Marriage Restraint Act 1929, a child cannot consent to a marriage though, however, that does not constitute a ground to

¹² Noshirvan H. Jhaval, p.148

¹³ Ibid

¹⁴ *The Child Marriage Restraint Act, 1929. s. 2(c)*

¹⁵ *The Hindu Marriage Act, 1955, India, s.7*

¹⁶ Prof. Badr Uddin, p. 211

render the marriage void.¹⁷ The guardians to such marriage invites penalty for their action. In India it has been provided by section 5(iii) of the Hindu Marriage Act 1955 that at the time of marriage the age of the bridegroom should not be less than 21 years and that of the bride should not be less than 18 years. Similar to the position of Bangladesh breach of this condition does not render the marriage void or voidable.¹⁸ Simply contravention of this condition is punishable with simple imprisonment, which may extend to 15 days or with fine, which may extend to one thousand rupees or with both.¹⁹ Unlike Hindu marriage in Bangladesh, a party to a marriage in India having spouse living at that time of marriage, or a party suffering from unsoundness of mind, suffering from such kind of mental disorder to the extent of incapacity to procreate children, or suffering from recurrent attacks of insanity or epilepsy cannot marry.²⁰

6. Dissolution of Marriage: A marriage under traditional Hindu Law may be dissolved by the death of either of the spouses. Hindus in Bangladesh follow traditional law where as Hindus in India follow statutory law.

6.1. Traditional Approach: In traditional Hindu law divorce is quite unknown and once a marriage is solemnized, it is inviolable unless otherwise provided. As per the direction of traditional Hindu law, it has been termed as a bond of bone with a bone, flesh with a flesh and only death can separate a couple from marriage tie. In no way a Hindu marriage can be dissolved by means of divorce. Even if the wife deserts her husband and becomes a harlot or whore, still the marriage continues to exist.²¹ It is interesting to note that traditional Hindu marriage is polygynous with a overtone of its being sacramental in nature. However this theocratic view as nourished by traditional Hindu law has been subject to massive reforms in present India.

6.2. Statutory Approach: In India the Hindu Marriage Act introduced many reforms in marriage including the provision for dissolution of it. On the other hand, the view that a Hindu marriage is indissoluble still continues to exist in Bangladesh with no modification or reform at all in any areas of it. Customary divorce among the law caste Hindus prevail in Bangladesh and it has been substantiated by case law.²² Since the independence of Bangladesh various reforms have taken place in Muslim family law, however, regrettably,

¹⁷ Ibid

¹⁸ Gandhi. BM, p. 226

¹⁹ *The Hindu Marriage Act*, 1955, India, s 18

²⁰ *The Hindu Marriage Act*, 1955, India, s 5

²¹ Prof. Badar Uddin, *Hindu Ain (Hindu Law)*, (Uttaran Offset Printing Press, Rajshahi: Quraesha Begum, 1991) p. 206/ *Narayan v Trilock* 1907.

²² Begum Asma Siddiqua, *Law of Marriage and Divorce in Bangladesh Today*, LLM Dissertation (Unpublished material), School of Oriental & African Studies, June 1989, p. 90.

no such initiative has still been taken to bring Hindu law up to date. In India since after the passing of the Hindu Marriage Act, 1955 adultery, cruelty, desertion, conversion, insanity or mental disorder, leprosy and venereal diseases, renouncing the world, unheard for seven years, decree of judicial separation, non-restitution of conjugal rights, bigamy, rape, maintenance decreed to wife and repudiation of marriage by the wife before she is 18 years of age have been mentioned as the grounds for which a spouse may institute a suit to the court for the separation of the marriage. That is for any of the above-mentioned grounds a Hindu marriage in India could be terminated. These provision of divorce derives a simile from the Dissolution of Muslim Marriages Act, 1939 applicable to the Muslims of both Bangladesh and India. The 1955 Act however, does not give any specific definition of those foregoing elements that constitute grounds for separation for a married couple. Existing facts and circumstances of each of the case would express whether any of those particular elements would constitute sufficient ground for separation between married couples in India. The courts in India, in disposing judgment in different cases of this criterion have focused on the grounds elaborately so as to which would constitute a ground for separation of a marriage. Thus, a second marriage without permission of the first wife has been held a sufficient ground of adultery in *(Dr) Jatindra Nath*²³ case wherein after marriage the husband went abroad for studies leaving his two minor daughters and his wife in India. He did not bring his wife with him and without the permission of his first wife he contracted a second marriage abroad. The first wife instituted a suit on the ground of cruelty, adultery and desertion. The suit of the wife was entertained by the court holding the husband guilty of adultery and the wife got divorce and the husband was ordered to pay her maintenance of Rs. 10,000 per month and to deposit Rs. 10 lacs in the court towards the expense of his daughters' marriage.

Similarly what constitutes cruelty depends upon the facts and circumstances of each case. It does not mean that cruelty must be of such a character so as to cause danger to life, limb or health or as to give rise to reasonable apprehension of such a danger following the spirit of English law.²⁴ Rather under the Hindu Marriage Act, 1955 of India, if it is of such a character as to cause in the mind of the aggrieved party a reasonable apprehension that it is harmful or injurious to him or her to live with the respondent, it is enough to constitute a ground of judicial decree to have the marriage terminated by the spouse so getting the

²³ *Veena Kalia v. Dr. Jatindra Nath Kalia*, AIR 1996 Del 54; also Gandhi. BM, *Hindu Law* (Delhi: Eastern Book Co., 2003) 2nd Edn. p. 249

²⁴ *Russel v. Russel*, 1897 AC 395; also Gandhi. BM, *Hindu Law* (Delhi: Eastern Book Co., 2003) 2nd Edn. p. 250

decree.²⁵ Thus refusal to prepare tea for the husband and his friends²⁶ or calling the husband a lunatic and alleging that a streak of thorough insanity runs through his entire family also have been considered as sufficient grounds for dissolution of the marriage by judicial decree.²⁷ It seems that the interpretation of cruelty is more close to the term used in Muslim law as in Dissolution of Muslim Marriages Act, 1939.

The Indian Parliament has not restrained itself only within these grounds of dissolution of Hindu marriage. In pursuance of the recommendation of the Indian Supreme Court in 2006, it has advanced itself some steps ahead of bringing some more reforms to the Hindu Marriage Act 1955. Now as per the amended Hindu Marriage Act 1955 rejection, negligence or abstention from having sex with the spouse will constitute the grounds of dissolution of marriage in addition to the grounds mentioned above.²⁸ Besides these, registration of marriage has been made compulsory by recent amendment to the Hindu Marriage Act, 1955.²⁹

Now it is pertinent to look into the prevailing situation in Bangladesh. Though around 10% of the total population of Bangladesh constitutes the Hindu community, no attempt has yet been taken to make amendments to the institutions of marriage and divorce. It is to be mentioned that there has been growing change to the attitude of the Hindu community in Bangladesh with regard to the traditional approach to marriage and in dissolution its. In this regard series of surveys which, have been conducted by the Bangladesh National Women Lawyers' Association BNWLA in the recent past, could be taken into consideration. In a survey conducted by it as to whether the Hindu community in Bangladesh is satisfied with the existing Hindu Family law, 76.67% of the male respondents and 84% of the female respondents expressed that they are dissatisfied with the existing family law in the sense that it discriminates against them.³⁰ The following table may be taken into consideration here³¹:

²⁵ *Kalpna Srivastava Surendra Nath*, AIR 1985 All; also Gandhi. BM, *Hindu Law* (Delhi: Eastern Book Co., 2003) 2nd Edn. p. 251

²⁶ *Bhagabat v. Bhagabat*, (1994) 1 SCC 337; also Gandhi. BM, *Hindu Law* (Delhi: Eastern Book Co., 2003) 2nd Edn. p. 251

²⁷ *Ibid*

²⁸ *দৈনিক যোগাযোগ* দিন, January 8, 2007, p.8, c.1

²⁹ *Ibid*

³⁰ Bangladesh National Women Lawyers Association, *Hindu Law* (Dhaka: BNWLA) p. 37

³¹ Bangladesh National Women Lawyers Association, *Hindu Law* (Dhaka: BNWLA) p. 38

Response	Sex				Total	
	Male		Female			
	Frequency	Percentage	Frequency	Percentage	Frequency	Percentage
Yes	30	20%	23	15.33%	53	17.67%
No	115	76.67%	126	84%	241	80.33%
No Response	5	3.33%	1	0.67%	6	2%
Total	150	100%	150	100	300	100%

As has been mentioned earlier a Hindu marriage, as the traditional approach goes is purely sacramental which is indissoluble and unbreakable bond between the spouses to be continued even after their death. However with the passage of time this sacramental attitude towards the nature of Hindu marriage has gone through considerable change. Members of Hindu community, in the recent years have come to realize that it is almost impossible to make them adoptable with this sacramental attitude to marriage and dissolution of the same. Now they are in the opinion that a Hindu marriage should not be understood and confined within the purview of sacramental attitude only. Rather it is to be understood as a contractual bond as well. The members of Hindu community in Bangladesh have spontaneously disseminated this opinion in the recent past. Now the members of Hindu community believes that they should have the right to divorce and judicial separation like the Muslims in Bangladesh under different statutory laws. In the recent past a survey conducted by BNWLA reveals the fact that in response to the question as to whether they want to enjoy the right to divorce, 60.67% of the Hindu female respondents and 58.67% of the male Hindu respondent expressed their view in favour of right to divorce.³² The following table may be taken into consideration here³³:

Response	sex				Total	
	Male		Female			
	Frequenc y	Percentage	Frequency	Percentage	Frequency	Percentage
Agreed	88	58.67%	91	60.67%	179	59.67%
Not Agreed	59	39.33%	58	38.67%	117	39%
No Response	3	2%	1	0.67%	4	1.33%
Total	150	100%	150	100	300	100%

³² Bangladesh National Women Lawyers Association, *Hindu Law* (Dhaka: BNWLA) p. 42

³³ Bangladesh National Women Lawyers Association, *Hindu Law* (Dhaka: BNWLA) p. 42

The right of divorce entails the right to remarriage specially for women as Hindu marriage in Bangladesh.

In response to a question as to whether the Hindus should have the right to remarriage 72% female and 68.67% male respondents replied in the positive expressing their view that they should have the right to remarriage.³⁴ The following table may be taken into consideration here.³⁵

Response	Sex				Total	
	Male		Female			
	Frequency	Percentage	Frequency	Percentage	Frequency	Percentage
Yes	103	68.67%	108	72%	211	70.33%
No	38	25.33%	40	26.67%	78	26%
No Response	9	6%	2	1.33%	11	3.67%
Total	150	100%	150	100	300	100%

It is worth mentioning that Hindu Widows Remarriage Act 1856 gives right to a Hindu widow to remarry but not to a Hindu divorce woman. New laws should be adopted to confer such right to Hindu woman.

6. Conclusion

Marriage in Hindu Law in Bangladesh remains in its antiques whereas India has made much progress by adapting new statutory law. In the same manner the dissolution of marriage by statutory divorce remained beyond the reach of the Hindu community in Bangladesh. The Hindu community has expressed their willingness for reform in the area of family law. Survey conducted by BNWLA reflects such willingness. New statutory law for Hindu community can be made similar to the laws applicable to Muslims. Marriage and divorce should be made compulsorily registrable. The marriage law may be carefully so drafted so as to make it contractual in nature along with preserving the religious requirements. Provision of arbitration must be kept in the law to give some space to ... matrimonial dispute, if any. Provision relating to divorce can draw a simile from the dissolution of Muslim Marriages Act, 1939 applicable to Muslim. The Hindu community should make a move to conduct more surveys in this area to come to a definite decision. They can recommend the government to take initiative to legislate on this matter so the people of their country can enjoy this social and family life with open choice and ease.

³⁴ Bangladesh National Women Lawyers Association, *Hindu Law* (Dhaka: BNWLA) p. 44

³⁵ The Hindu Marriage Act, 1955, India, s. 5(1)